

FILED 11 JUN 2011 40USDC-ORH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JERRY DWIGHT BLANEY,

Petitioner,

Civ. No. 11-163-CL

v.

ORDER

STATE OF OREGON,

Respondent.

PANNER, District Judge:

Magistrate Judge Mark D. Clarke filed a Report and Recommendation ("Report") [#8], and the matter is now before this court. See 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). Petitioner filed objections [#10] to the Report. Accordingly, I have reviewed the file of this case *de novo*. See 28 U.S.C. § 636(b)(1)(c); McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). I conclude the Report is correct.

As noted in the Report, although petitioner apparently serves an unrelated sentence in Texas, petitioner is not "in custody" as to the 2005 Oregon 38-month sentence challenged here. See Garlotte

v. Fordice, 115 S.Ct. 1948, 1952 (1995); Burnett v. Lampert, 432 F.3d 996, 999-1000 (9th Cir. 2005). Plaintiff challenges certain alleged actions taken by petitioner's trial judge during petitioner's 2005 trial. Because the judge is entitled to absolute immunity, the petition must be dismissed even if construed as a Section 1983 claim. Olsen v. Idaho State Bd. of Medicine, 363 F.3d 916 at 922-23 (9th Cir. 2004). Petitioner's objection that absolute immunity does not apply because petitioner sues the State of Oregon rather than the judge individually is meritless.

Magistrate Judge Clarke's Report and Recommendation [#8] is adopted. The petition [#1] is denied and this action is dismissed. Because petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability is DENIED. See 28 U.S.C. § 2253(2).

IT IS SO ORDERED.

DATED this 20 day of June, 2011.



OWEN M. PANNER
U.S. DISTRICT JUDGE